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No. 99-1043

In the Supreme Court of the United States

LENOX MICHAEL OKOLIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended 28 U.S.C. 2255 (Supp. III 1997) to establish a "1-year period of limitation" governing motions for collateral relief under that Section. That period runs from the latest of four specified events, only one of which is relevant to this case—"the date on which the judgment of conviction becomes final." 28 U.S.C. 2255 (Supp. III 1997). In cases such as this one, in which the defendant's judgment of conviction became final before AEDPA took effect on April 24, 1996, the courts of appeals have recognized a one-year grace period, running from AEDPA's effective date, within which prisoners may file Section 2255 motions. The question presented is whether the one-year grace period expired on April 23, 1997, or April 24, 1997.

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OPINIONS BELOW

The order of the court of appeals denying petitioner a certificate of appealability and dismissing his appeal (Pet. App. A1) is not yet reported. The order of the district court denying petitioner a certificate of appealability (Pet. App. A1-A2) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1999. The petition for a writ of certiorari was filed on December 16, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to distribute heroin and cocaine, in violation of 21 U.S.C. 846, and distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 169 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed petitioner's conviction and sentence in an unpublished order. *United States* v. *Okolie*, 39 F.3d 323 (11th Cir. 1994) (Table), cert. denied, 513 U.S. 1198 (1995). Petitioner thereafter filed a motion to vacate his conviction and sentence under 28 U.S.C. 2255. The district court denied relief and denied a certificate of appealability (COA). Pet. App. A1-A4. The court of appeals likewise denied a COA and dismissed petitioner's appeal. *Id.* at A1.

On April 29, 1997, the district court received and docketed petitioner's pro se Section 2255 motion. Pet. App. A9. In its answer to petitioner's motion, the government argued, among other things, that the motion should be dismissed as untimely under the one-year limitations period in Section 2255. Gov't Answer to Movant's Motion to Vacate 4, 12, 14.

Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended 28 U.S.C. 2255 to establish a "1-year period of limitation" governing motions for collateral relief under that Section. That period runs from the latest of four specified events, only one of which is relevant to this case—"the date on which the judgment of conviction becomes final." 28 U.S.C. 2255 para. 6(1) (Supp. III 1997).[1] In cases such

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[1] The time limit provision provides that it runs from the "latest" of four specified events, including (2) "the date on which

as this one, in which the defendant's judgment of conviction became final before AEDPA took effect on April 24, 1996, the courts of appeals have recognized a one-year grace period, running from AEDPA's effective date, within which prisoners may file Section 2255 motions. See *Rogers* v. *United States*, 180 F.3d 349, 353-354 & n.9 (1st Cir. 1999), cert. denied, 120 S. Ct. 958 (2000).

In its answer to petitioner's motion, the government noted that "the Department of Justice has taken the position that defendants whose convictions became final prior to April 24, 1996 had until April 24, 1997 to file any motions pursuant to 28 U.S.C. § 2255." Gov't Answer to Movant's Motion to Vacate 12. The government contended that petitioner's Section 2255 motion was untimely because it was filed on April 29, 1997, five days after the end of the grace period. See *id.* at 4, 14.

The magistrate judge recommended dismissal of petitioner's motion as untimely but on grounds different from those asserted by the government. Petitioner's Section 2255 motion contained a "solemn declaration" that he had placed the motion in the prison legal mail system on April 24, 1997. Pet. App. A9. Relying on that declaration, the magistrate judge "assumed that

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the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action"; (3) "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"; or (4) "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. 2255 para. 6(2)-(4) (Supp. III 1997). Those three subsections are not at issue in this case. See Pet. App. A9-A10.

the present motion was filed on April 24, 1997." *Ibid.*; see generally *Houston* v. *Lack*, 487 U.S. 266 (1988). The magistrate judge concluded, however, that the one-year grace period expired on April *23*, 1997, rather than April *24*, 1997, and she therefore recommended that petitioner's motion be denied as untimely. See Pet. App. A10. The district court adopted the magistrate judge's report and recommendation. *Id.* at A4.

Petitioner moved for reconsideration and, in the alternative, for a COA. Without requiring a response from the government, the magistrate judge recommended denial of petitioner's requests. The magistrate judge maintained the view that petitioner's motion was untimely, but also noted that "review of the case reveals that [petitioner] would have virtually no chance of success if [his] claims were considered on the merits." Report & Recommendation 5. Recommending denial of petitioner's request for a COA, the magistrate judge stated that "[r]eview of the file in this case reveals that no [substantial] showing [of the denial of a constitutional right] has been made." *Id.* at 6. The district court adopted the magistrate judge's report and recommendation. See Pet. App. A1-A2.

Petitioner filed a notice of appeal. On September 17, 1999, finding that petitioner "failed to make a showing of the denial of a constitutional right," the court of appeals denied him a COA and dismissed his appeal. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 7-8) that this Court's review is needed to resolve a conflict among the courts of appeals concerning whether a Section 2255 motion to set aside a conviction that became final before the enactment of the Antiterrorism and Effective Death

Penalty Act of 1996 (AEDPA) is timely if the motion was filed on April 24, 1997. There is a conflict among the courts of appeals on that question: some courts have stated that such motions are timely until April *23*, 1997, while others have identified April *24*, 1997, as the cut-off date for filing. This Court's resolution of that conflict is not necessary, however, because the issue lacks continuing importance. Moreover, the court of appeals correctly denied petitioner a certificate of appealability (COA), because, regardless of whether his Section 2255 motion was timely, he has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2) (Supp. III 1997). Accordingly, the petition for a writ of certiorari should be denied.

1. As described above, in cases such as this one, in which the defendant's judgment of conviction became final before AEDPA took effect on April 24, 1996, the courts of appeals have recognized a one-year grace period, running from AEDPA's effective date, within which to file a Section 2255 motion (or a habeas corpus petition under the analogous time limit for state prisoners, 28 U.S.C. 2244(d)(1)(A) (Supp. III 1997)). See *Rogers* v. *United States*, 180 F.3d 349, 353-354 & n.9 (1st Cir. 1999) (citing cases), cert. denied, 120 S. Ct. 958 (2000); *Mickens* v. *United States*, 148 F.3d 145, 148 (2d Cir. 1998); *Burns* v. *Morton*, 134 F.3d 109, 111-112 (3d Cir. 1998); *Brown* v. *Angelone*, 150 F.3d 370, 374-375 (4th Cir. 1998); *Flanagan* v. *Johnson*, 154 F.3d 196, 200-202 (5th Cir. 1998); *Brown* v. *O'Dea*, 187 F.3d 572, 576 (6th Cir. 1999); *Lindh* v. *Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997); *Moore* v. *United States*, 173 F.3d 1131, 1133-1135 (8th Cir. 1999); *Calderon* v. *United States District Court*, 128 F.3d 1283, 1287 (9th Cir. 1997), cert. denied, 522 U.S. 1099 and 523 U.S. 1061 (1998), overruled on

other grounds, *Calderon* v. *United States District Court*, 163 F.3d 530 (9th Cir. 1998) (en banc), cert. denied, 119 S. Ct. 1377 (1999); *United States* v. *Simmonds*, 111 F.3d 737, 745-746 (10th Cir. 1997); *Goodman* v. *United States*, 151 F.3d 1335, 1337 (11th Cir. 1998).

In calculating the precise length of that one-year grace period, some courts have stated that applications for collateral relief are timely if filed on or before April *23*, 1997, and other courts have held that such applications are timely if filed on or before April *24*, 1997. See *Rogers*, 180 F.3d at 355 n.13 (citing cases). Specifically, the First, Second, Fifth, and Eighth Circuits have held that the cut-off date is April 24. See *id.* at 355; *Mickens*, 148 F.3d at 148; *Flanagan*, 154 F.3d at 201-202; *Moore*, 173 F.3d at 1135. The Third, Fourth, Seventh, Ninth, Tenth and Eleventh Circuits have stated that the cut-off date is April 23. See *Burns*, 134 F.3d at 111; *Brown* v. *Angelone*, 150 F.3d at 375; *Lindh*, 96 F.3d at 866; *Calderon*, 128 F.3d at 1287; *Simmonds*, 111 F.3d at 746; *Goodman*, 151 F.3d at 1337.

The United States agrees with those courts of appeals that have concluded that the deadline is April 24, 1997. All the courts of appeals that have devoted extended analysis to the question have concluded that April 24 is the correct cut-off date. The courts that have adopted an April 23 cut-off date in published decisions have done so without extended reasoning, and in cases in which the precise length of grace period did not make a difference to the outcome.[2] Federal Rule of

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[2] In unpublished decisions, the Tenth and Fourth Circuits have concluded that collateral attacks filed on April 24, 1997, are untimely. See *Garza* v. *Gibson*, No. 98-7030, 2000 WL 6194 (10th Cir.

Civil Procedure 6(a) provides that "[i]n computing any period of time prescribed or allowed * * * by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included." Federal Rule of Criminal Procedure 45(a) provides, in part, that "[i]n computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included." The Federal Rules of Civil Procedure inform the proper procedure in cases under 28 U.S.C. 2254 (1994 & Supp. III 1997), and those rules and the Federal Rules of Criminal Procedure inform the proper procedure in cases under Section 2255. See Rule 11 of the Rules Governing Section 2254 Cases; Rule 12 of the Rules Governing Section 2255 Cases. This Court long ago endorsed a similar principle. See *Sheets* v. *Selden's Lessee*, 69 U.S. (2 Wall.) 177, 190 (1864).

This Court's intervention is not required, however, to resolve the tension among the courts of appeals. There is universal agreement that a one-year grace period applies to the time-limit provisions. *Moore*, 173 F.3d at 1133. The dispute over the precise length of the grace period affects only a small number of collateral attacks—those filed on April 24, 1997. Most of those cases have by now been resolved, and the issue is of little ongoing significance. Review of the issue by this Court is therefore unnecessary.

2. This case would not, in any event, be an appropriate one in which to resolve the question, because the court of appeals correctly denied petitioner a certificate of appealability, even if his Section 2255 motion was timely filed. A certificate of appealability may issue

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Jan. 6, 2000) (unpublished); *United States* v. *Runnells*, 162 F.3d 1158 (4th Cir. 1998) (Table).

only if the applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2) (Supp. III 1997). Petitioner has not made that showing because the claims in his Section 2255 motion lack merit.[3]

As the government pointed out in its answer to petitioner's Section 2255 motion (page 14-17), many of the issues raised by petitioner were rejected on direct appeal and are therefore foreclosed on collateral review, and others were never raised and are therefore procedurally defaulted. See, *e.g.*, *Withrow* v. *Williams*, 507 U.S. 680, 720-721 (1993) (Scalia, J., concurring) (collecting cases); *United States* v. *Frady*, 456 U.S. 152 (1982); *United States* v. *Perez* 129 F.3d 255, 260 (2d Cir. 1997). As to petitioner's remaining claims, the magistrate judge, in recommending denial of petitioner's request for a COA, correctly stated that "review of the case reveals that [petitioner] would have virtually no chance of success if [his] claims were considered on the merits." Report & Recommendation 5.

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[3] Some courts of appeals have held that they may review a procedural ruling denying collateral relief without a showing that an underlying constitutional claim has potential merit. See, *e.g.*, *Gaskins* v. *Duval*, 183 F.3d 8, 9 n.1 (1st Cir. 1999), *Whitehead* v. *Johnson*, 157 F.3d 384, 388 (5th Cir. 1998). See also *Henry* v. *Department of Corrections*, 197 F.3d 1361, 1366 n.2 (11th Cir. 1999) (reserving question). This Court's decision in *Slack* v. *McDaniel*, No. 98-6322 (to be reargued on Mar. 29, 2000), may shed light on that issue. There is no need, however, to hold this case pending the decision in *Slack*, because, as we explain in the text, the time-limit issue that petitioner has raised has no continuing significance, and petitioner's underlying claims are without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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